Jane Doe v. MySpace, Inc. et al Doc. 4 Att. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, Individually and
As Next Friend of JULIE DOE, a minor,

Plaintiffs,

v.

MYSPACE, INC., and
NEWS CORPORATION,

Defendants.

No. 06-cv-7880 (MGC/AJP)

MEMORANDUM OF LAW IN SUPPORT OF MYSPACE, INC.'S MOTION TO DISMISS

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MEMORANDUM OF LAW IN SUPPORT OF MYSPACE, INC.'S MOTION TO DISMISS

Defendant MySpace, Inc. ("***MySpace***") hereby files this Memorandum of Law in Support of its motion to dismiss all claims asserted against it pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) for failure to state a claim upon which relief may be granted. MySpace is moving separately, pursuant to 28 U.S.C. § 1404(a), to have this action transferred to the Western District of Texas, Austin Division

This case arrived in New York because of Plaintiffs' blatant forum-shopping. Plaintiffs' claims arise from the alleged sexual assault of Julie Doe, a Texas resident, by Pete Solis, a Texas resident, in Austin, Texas. Plaintiffs originally filed suit in state court in Austin,[1] amended their petition,[2] then dismissed the Texas lawsuit[3] in lieu of responding to the pending motion seeking dismissal of all claims. The day before they dismissed their Texas lawsuit, Plaintiffs filed this suit in New York Supreme Court in Bronx County, and MySpace promptly removed the action to this Court. Having twice attempted to plead their claims in Texas (before voluntary dismissal), Plaintiffs now seek a third bite at the apple by re-filing their claims in New York.

In any forum, Plaintiffs cannot escape the reality that this lawsuit is barred by the Communications Decency Act of 1996, which immunizes interactive computer services from liability based on the online communications of third parties, as well as by applicable state common law, under which (1) MySpace has no duty to protect MySpace.com users against criminal acts by third parties, (2) the intervening criminal act—not alleged misrepresentations by MySpace—caused Plaintiffs' injury, and (3) Plaintiffs cannot establish justifiable reliance on the alleged misrepresentations because the Terms of Use Agreement plainly disclaims any guarantee of the safety of MySpace.com users offline. Moreover, Plaintiffs fail to plead the reliance element of their fraud and negligent misrepresentation claims with particularity as required by Federal Rule of Civil Procedure 9(b). Even if Plaintiffs had adequately pleaded reliance, the documents incorporated in the Verified Complaint—MySpace.com's Terms of Use Agreement and Tips for Parents—prove that MySpace made no misrepresentations about its ability to verify any user's age or the safety of MySpace.com for young users. MySpace therefore respectfully requests that this Court dismiss this lawsuit pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b).[4]

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[1] *See* Plaintiffs' Original Petition ("***Orig. Tex. Pet.***"), filed in *Doe v. MySpace, Inc., et al.*, No. D-1-GN-06-002209 (261st Dist. Ct., Travis County, Tex. June 19, 2006) (attached as Exhibit A to the Affidavit of Clifford Thau in Support of MySpace, Inc.'s Motion to Dismiss, sworn to on Oct. 13, 2006, hereinafter referred to as the "***Thau Aff.***").

[2] *See* Plaintiffs' First Amended Original Petition ("***Am. Tex. Pet.***"), filed in *Doe v. MySpace, Inc., et al.*, No. D-1-GN-06-002209 (261st Dist. Ct., Travis County, Tex. Aug. 10, 2006) (attached as Exhibit B to the Thau Aff.).

[3] *See* Plaintiffs' Motion to Nonsuit, filed in *Doe v. MySpace, Inc., et al.*, No. D-1-GN-06-002209 (261st Dist. Ct., Travis County, Tex. Sept. 27, 2006) and Order granting same signed Sept. 28, 2006 (both attached as Exhibit C to the Thau Aff.).

I.
BACKGROUND

A. MySpace.com and Social Networking Web Sites

MySpace.com is the most visited web site in the United States, ahead of long-time marquee web sites like Yahoo, MSN, eBay, and Google.[5] MySpace.com is owned by Defendant MySpace, Inc.[6]

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[4] MySpace assumes, as it must on a motion to dismiss under Rule 12(b)(6), the truth of the well-pleaded allegations in the Complaint. As discussed below, however, Plaintiffs are not entitled to the customary presumption to the extent their allegations are contradicted by the Complaint or documents incorporated therein. *See, e.g.*, *Sazerac Co. v. Falk*, 861 F. Supp. 253, 257 (S.D.N.Y. 1994) ("[I]f the allegations of a complaint are contradicted by documents made a part thereof, the document controls and the court need not accept as true the allegations of the complaint.").

[5] *See* Verified Complaint ("***Verified Compl.***") at ¶ 6 in *Jane Doe v. MySpace, Inc. and News Corp.*, Supreme Court of the State of New York, County of Bronx, Index No. 21278/06 (citing at footnote 1 Bill Tancer, *MySpace Moves Into #1 Position for all Internet Sites*, Hitwise Intelligence Analyst Blogs (July 11, 2006), http://weblogs.hitwise.com/bill-tancer/2006/07/myspace_moves_into_1_position.html (the Verified Complaint is attached as Exhibit D to the Thau Aff.).

[6] Defendant MySpace, Inc. is wholly owned by Fox Interactive Media, Inc., a subsidiary of Defendant News Corporation.

Commonly referred to as a "social networking web site," MySpace.com allows its members to create online "profiles," which are individual web pages on which members post photographs, videos, and information about their lives and interests.[7] The idea of online social networking is that members will use their online profiles as a vehicle to become part of an online community of people with common interests. Once a member has created a profile, she can extend "friend invitations" to other MySpace.com members and communicate with her friends over the MySpace.com platform via e-mail, instant messaging, or blogs.[8] The MySpace.com platform also allows members to assemble around common interests through its user groups, which cover topics like film, travel, government, politics, and sports.[9] Actors, musicians, comedians, and politicians also create profiles to publicize themselves and interface with fans.[10] MySpace.com members interested in meeting friends within a certain geographic area can use the site's browse feature to search for members whose profiles meet various criteria. MySpace.com is free to users who agree to the MySpace Terms of Use Agreement.[11]

B. MySpace's Voluntary Safety Measures for Young Teen Users

As Plaintiffs allege, the MySpace.com community is open to users age 14 and over.[12] To prevent young teens from being contacted by adult members they do not know, 14 and 15 year-old members' profiles are set to "private" by default, which limits the amount of information that

[7] *See* Verified Compl. at ¶ 9 (Ex. D to the Thau Aff.); *see also* MySpace Terms of Use Agreement, May 1, 2006, cited and incorporated by reference in Plaintiffs' Verified Complaint at ¶ 24 (attached as Exhibit A to the Affidavit of Matt Polesetsky in Support of MySpace, Inc.'s Motion to Dismiss, sworn to on Oct. 12, 2006, hereinafter referred to as the "***Polesetsky Aff.***"). Pursuant to the MySpace.com Terms of Use Agreement, a MySpace "Member" is a person who has registered with MySpace.com, while a "Visitor" is a person who simply browses MySpace.com without registering. The term MySpace.com "user" encompasses both visitors and members.

[8] *See* Verified Compl. at ¶ 9 (Ex. D to the Thau Aff.).

[9] *See* Saul Hansell, *Making Friends Was Easy. Big Profit Is Tougher*, N.Y. Times, Apr. 23, 2006 (cited in footnotes 3, 5-7 , and 9 of Plaintiffs' Verified Complaint and attached as Exhibit E to the Thau Aff.).

[10] *Id.*

[11] *See* MySpace Terms of Use Agreement, May 1, 2006 (Ex. A to the Polesetsky Aff.).

[12] *See* Verified Compl. at ¶ 8 (Ex. D to the Thau Aff.).

can be seen on the teen member's profile by members who are not in the teen's friends network. Additionally, adult members cannot send private or instant messages to a 14 or 15 year-old unless the teen gives the adult member permission to send further communications by "accepting" a friend request. But as set forth in the MySpace "Tips for Parents," which Plaintiffs cite in their Verified Complaint, these protections are automatically applied only to the profiles of teenagers who honestly represent themselves to be 14 or 15 years old:

> Kids shouldn't lie about how old they are. MySpace members must be 14 years of age or older. *We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such.* MySpace will delete users whom we find to be younger than 14, or those misrepresenting their age.[13]

As discussed below, these warnings and prohibitions are echoed in the MySpace Terms of Use Agreement as well as in several of the news publications that Plaintiffs cite in their Verified Complaint.[14]

C. Julie Doe Creates a MySpace Profile by Misrepresenting Her Age and Meets Pete Solis

Unfortunately, according to Plaintiffs' Verified Complaint, Julie Doe ignored these prohibitions and created a MySpace profile when she was only 13 years old.[15] When she joined

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[13] *See* MySpace Tips for Parents, cited and incorporated by reference in the Verified Complaint at ¶ 24 and attached as Exhibit B to the Polesetsky Aff.

[14] *See* Julia Angwin & Brian Steinberg, *News Corp. Goal: Make MySpace Safer for Teens*, Wall St. J., Feb. 17, 2006, at B1 ("The company says it has a computer program that checks for clues that users might be lying about their age and has removed 200,000 profiles as a result. Like other sites, MySpace doesn't verify users' ages. 'No one on the Internet with a free site has ever come up with a way to do that,' Mr. DeWolfe says.") (attached as Exhibit F to the Thau Aff.); John Moritz, *Texas AG Wants Web Sites to Protect Young Users*, Fort Worth Star-Telegram, May 23, 2006 ("A message in the 'tips for parents' section reads: 'We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such.'") (attached as Exhibit G to the Thau Aff.); *MySpace.com to Bolster Security Measures*, Reuters Limited, March 3, 2006 ("But DeWolfe said that the system [of restricting access to 14 and 15 year-olds] is not foolproof and that no web site has developed technology to verify the age of all users reliably.") (attached as Exhibit H to the Thau Aff.); Jessi Hempel, *From MySpace to Safer Place?*, Business Week, April 11, 2006 ("As it stands, children under 14 aren't allowed to create profiles, though many children below that age lie about their age and create profiles anyway.") (attached as Exhibit I to the Thau Aff.).

[15] *See* Verified Compl. at ¶ 27 (Ex. D to the Thau Aff.).

MySpace.com, Julie Doe agreed to be bound the MySpace.com Terms of Use Agreement, which makes clear that MySpace cannot verify the age or identity of MySpace.com members and cautions its members never to provide "telephone numbers, street addresses, last names, URLs or e-mail addresses" to other members.[16]

Plaintiffs allege that Pete Solis initiated contact with Julie Doe through MySpace.com on April 6, 2006. Subsequently, the two communicated offline in several telephone conversations after Julie Doe provided Pete Solis with her telephone number. At some point, the two arranged to meet for a date on May 12, 2006, and it is during that date that Plaintiffs allege Pete Solis sexually assaulted Julie Doe.[17]

D. Julie and Jane Doe Sue MySpace in Texas, and then in New York

On June 19, 2006, Julie Doe and her mother, Jane Doe, as next friend (the "***Plaintiffs***"), filed a lawsuit in Travis County, Texas (the "***Texas Lawsuit***"), naming as defendants MySpace, News Corporation, and Pete Solis and seeking $30 million in damages.[18] Plaintiffs alleged that MySpace was negligent and grossly negligent for failing its duty to "substantially decrease the likelihood of danger and harm that MySpace posed to [Julie Doe]"[19] and that MySpace committed fraud and negligent misrepresentation by misrepresenting to the public "that MySpace was safe for young underage MySpace users."[20]

On July 24, 2006, MySpace and News Corporation filed an answer and special exceptions seeking dismissal of the suit. On August 10, 2006, in response to defendants' special exceptions, Plaintiffs filed an amended complaint attempting to address the deficiencies in their pleading.[21] Because the claims remained fatally flawed, the defendants again filed special exceptions seeking dismissal. The Parties agreed to a briefing schedule and a date for the dismissal hearing. The hearing was set for October 11, 2006, but on September 27, 2006, one day after their opposition brief was due, Plaintiffs dismissed the Texas case in the face of a potentially dispositive ruling of dismissal.[22]

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[16] *See* MySpace Terms of Use Agreement, May 1, 2006 at § 8.6 (Ex. A to the Polesetsky Aff.).

[17] *See* Am. Tex. Pet. at ¶¶ 32-33 (Ex. B to the Thau Aff.).

[18] *See* Orig. Tex. Pet. (Ex. A to the Thau Aff.). Plaintiffs have not sued Pete Solis in New York.

[19] *Id.* at ¶ 46.

[20] *Id.* at ¶ 59.

On September 26, 2006, one day before they dismissed the Texas Lawsuit, Plaintiffs filed this lawsuit (the "***New York Lawsuit***") against MySpace and News Corporation in the New York Supreme Court in Bronx County (despite the fact that News Corporation is located in Manhattan). On September 29, 2006, having satisfied all of the procedural requirements of 28 U.S.C. § 1446 and Local Rule 81.1, MySpace removed this action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1441.

II.
ARGUMENT

Plaintiffs Jane and Julie Doe allege that 19-year-old Pete Solis met 14-year-old Julie Doe online at MySpace.com and subsequently sexually assaulted her while the two were on a date. Plaintiffs' suit is an attempt to hold MySpace liable for this alleged criminal conduct of Pete Solis, a teenager who has no relationship with MySpace other than having been one of the now 118 million members of MySpace.com. Plaintiffs fail to state a claim against MySpace on which relief may be granted because the Communications Decency Act of 1996 bars each cause of action in the Verified Complaint. Plaintiffs' claims against MySpace also fail under the common law[23] because: (1) there is no duty to prevent third parties from committing crimes; (2) the alleged sexual assault was a "new and independent cause" of Plaintiffs' injuries; and (3)

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[21] *See* Am. Tex. Pet. (Ex. B to the Thau Aff.).

[22] *See* Plaintiffs' Motion for Nonsuit and Order granting same (Ex. C to the Thau Aff.).

[23] Under New York choice of law rules, Texas law governs the common law claims. *See infra* Part II.B.1.

Plaintiffs cannot establish justifiable reliance on the alleged misrepresentations because the Terms of Use Agreement plainly disclaims any guarantee of the safety of MySpace.com users offline. Moreover, Plaintiffs' fraud and negligent misrepresentation claims do not satisfy the heightened pleading standard imposed by Federal Rule of Civil Procedure 9(b).[24] For these reasons, Plaintiffs have not, and cannot, state a claim against MySpace on which relief can be granted.

A. MySpace Is Immune from Plaintiffs' Suit Under the Communications Decency Act of 1996

Plaintiffs' claims against MySpace are barred under the Communications Decency Act of 1996, 47 U.S.C. § 230 (the "***CDA***" or "***Act***"). The CDA immunizes "interactive computer services" like MySpace from suits based on the online communications or related offline behavior of its users. Furthermore, the CDA immunizes MySpace from suits based on the effectiveness of its voluntary safety measures that restrict access to its teenage members' content. Because MySpace's safety features prohibiting adults from communicating with young teenage members are voluntary measures to self-regulate MySpace.com, Plaintiffs' claims that these measures were ineffective are barred by the CDA.

1. *The CDA Immunizes MySpace from Claims Involving the Online Postings or Offline Conduct of Its Users*

The CDA recognizes the practical impossibility of ensuring the safety of MySpace users and the accuracy of every online posting. Congress enacted the CDA in 1996 "to promote the continued development of the Internet . . . unfettered by Federal and State regulation."[25] To ensure that web site operators and other interactive computer services would not be crippled by lawsuits arising out of third-party communications, the Act provides interactive computer services with broad immunity.[26] In pertinent part, the Act provides:

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[24] Rule 9(b) applies to negligent misrepresentation as well as fraud. *See Henneberry v. Sumitomo Corp. of Am.*, 415 F. Supp. 2d 423, 454 (S.D.N.Y. 2006) ("Allegations in support of either a negligent misrepresentation or fraudulent misrepresentation claim must be pleaded with particularity pursuant to Federal Rule of Civil Procedure 9(b).") (citing *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 578-79, 583 (2d Cir. 2005)).

[25] 47 U.S.C. § 230(b)(1) & (2) (2001).

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[27]
>
> . . .
>
> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[28]

The Act thus encourages web sites and other "interactive computer services" to create forums for ordinary citizens to exchange their thoughts and ideas.[29]

In light of this clearly articulated policy, courts have construed the CDA broadly, even when the online communication arguably creates a serious risk of harm.[30] In *Carafano v. Metrosplash.com, Inc.*,[31] a Ninth Circuit case involving the on-line dating site Matchmaker.com, an unidentified third party posted a false on-line personal ad portraying Christine Carafano, a popular television and film actress, to be a sexually promiscuous woman in search of sexual partners.[32] Shortly after the ad was posted, Ms. Carafano began receiving sexually explicit phone calls, letters, and hand-delivered notes at her home. The messages were so threatening and disturbing that Carafano went into hiding for months.[33]

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[26] *See Dimeo v. Max*, 433 F. Supp. 2d 523, 528 (E.D. Pa. 2006) ("The provision 'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone, or alter content.'") (quoting *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d. Cir. 2003) and *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

[27] 47 U.S.C. § 230(c)(1).

[28] 47 U.S.C. § 230(e)(3).

[29] *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-24 (9th Cir. 2003); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997); *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir. 2003); *Prickett v. InfoUSA, Inc.*, No. 4:05-CV-10, 2006 WL 887431, at *4 - *5 (E.D. Tex. Mar. 30, 2006).

[30] *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (noting "the consensus developing across other courts of appeals that § 230(c) provides broad immunity for publishing content provided primarily by third parties."); *Batzel v. Smith*, 333 F.3d 1018, 1030-32 (9th Cir. 2003); *Green*, 318 F.3d at 470-71; *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Zeran*, 129 F.3d at 328-29.

[31] 339 F.3d 1119 (9th Cir. 2003).

[32] *Id.* at 1121.

Ms. Carafano sued Matchmaker.com for negligence, among other claims. Despite the seriousness of her ordeal, the Ninth Circuit affirmed the dismissal of Carafano's suit, holding that under Section 230(c) of the CDA, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity."[34] Discussing the policy underlying the CDA, the court explained:

> The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.[35]

The Ninth Circuit thus recognized that imposing a duty to ensure that all postings are "safe" or otherwise problem-free would threaten the viability of interactive computer services and thereby reduce the channels of communication available on the Internet.[36]

Plaintiffs' allegation that MySpace knew about prior criminal incidents involving other MySpace.com members does not dilute the immunity provided by the CDA. In *Zeran v. America Online, Inc.*,[37] the victim of a vicious prank sued America Online, Inc. ("AOL") for failing to remove a false advertisement offering t-shirts featuring tasteless slogans relating to the 1995 bombing of the Oklahoma City Federal Building and instructing interested buyers to call the plaintiff to place an order.[38] After receiving death threats from people who were enraged by the ad, Zeran learned of the prank and immediately demanded that AOL remove the ad from its bulletin board and post a retraction. AOL not only failed to remove the original ad; it allowed the unidentified poster to post several more.[39] A local radio station learned of the ads and encouraged its listeners to harass Zeran. The volume and intensity of threats became so severe that local police had to guard his home for weeks.[40]

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[33] *Id.* at 1122.

[34] *Id.* at 1124.

[35] *Id.* at 1123-24.

[36] *Id.* at 1124-25.

[37] 129 F.3d 327 (4th Cir. 1997).

Zeran sued AOL for negligence on the grounds that it failed to remove the ad after specific notice of its falsity and that AOL allowed the third party to post additional ads after it was put on notice of Zeran's harassment and bodily danger. The Fourth Circuit affirmed the dismissal of the claims on the pleadings, explaining that the CDA necessarily protects interactive computer services from liability even after they are notified of an allegedly defamatory or threatening post because the insupportable legal burden imposed by potential tort liability would undermine the CDA's goal of promoting speech on the Internet through interactive computer services.[41] MySpace's generalized and non-specific knowledge of a risk to MySpace.com users falls far short of AOL's actual knowledge of an imminent, specific risk of harm to a specific individual, which the Third Circuit held insufficient to deprive AOL of CDA immunity.

The CDA's immunity applies even when an interactive computer service promises, but fails, to verify the information posted on its web site by third parties. In *Prickett v. InfoUSA,*

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 330 ("The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. In specific statutory findings, Congress recognized the Internet and interactive computer services as offering "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.") (citing 47 U.S.C. § 230(a)(3)); *id.* at 333.

Inc., the Eastern District of Texas held that InfoUSA, SBC, and Yahoo could not be liable for an erroneous online business listing stating that the plaintiffs ran an adult lingerie and entertainment business.[42] Scores of drunk and belligerent men began harassing the plaintiffs, by telephone and in person, at all hours of the night, causing the plaintiffs to fear for their lives and leading a neighbor to call Child Protective Services.[43] The Prickets sued, arguing that the interactive computer services were responsible because they claimed to "call every business to verify the information, so you can be assured of the most current and accurate listings."[44] The court nevertheless dismissed the claims, holding that the plaintiffs' attempt "to hold the Defendant liable for its alleged failure to verify the accuracy of the listing does not remove this case from the immunity provided by § 230."[45]

The *Carafano*, *Zeran*, and *Prickett* opinions make clear that MySpace has no duty to ensure the safety of MySpace.com's 118 million-plus members. To the contrary, the CDA bars claims relating to the online publications or related offline conduct of MySpace.com members. This result follows from Congress's policy favoring the free flow of information over the Internet—a policy which acknowledges the practical impossibility of preventing MySpace's millions of users from posting false or offensive content.

2. *The CDA Immunizes MySpace from Claims Involving Its Voluntary Efforts to Restrict Teenagers from Communicating with Unknown Adults*

The CDA also encourages interactive computer services to self-regulate by granting immunity from claims based on "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy,

[42] No. 4:05-CV-10, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006).

[43] *Id.* at *1.

[44] *Id.* at *3.

[45] *Id.* at *5 (citations omitted).

excessively violent, harassing, or otherwise objectionable."[46] Congress recognized that potential liability for ineffective safety features and editorial policies created a disincentive to implement any preventive measures at all. Because Plaintiffs seek to do just that—hold MySpace liable for alleged shortcomings in its voluntary safety features—their claims are barred by the CDA.

Plaintiffs complain that MySpace lacked effective safety features to protect young teens.[47] MySpace.com incorporates safety features that restrict adult users from browsing for or messaging MySpace.com members between the ages of 14 and 15. These members' profiles are automatically set to private, which limits the information publicly available on that member's profile and prohibits users who are not in the teen's friends network from sending private or instant messages to her.[48] Plaintiffs argue that these features were insufficient because Julie Doe was able to create a MySpace profile when she was 13 years old by misrepresenting her age[49] and because Pete Solis, a 19 year-old, was able to contact Julie Doe when she was only 14.

These are precisely the types of claims that are barred by the CDA's "Good Samaritan" provision. The above-mentioned safety features are purely voluntary measures taken by MySpace. There is nothing illegal about adults communicating with teenagers online, nor does the law require that web sites verify the age of their users. In fact, the Supreme Court has recognized that online age verification is impossible, ineffective, and potentially unconstitutional.[50] Because MySpace's efforts to restrict access to its younger members' profiles are completely voluntary, the CDA immunizes MySpace from liability for their alleged failure.[51]

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[46] 47 U.S.C. § 230(c)(2)(A); *see also Ben Ezra*, 206 F.3d at 986 ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions"); *Zeran*, 129 F.3d. at 331 (4th Cir. 1997) (in enacting § 230, Congress sought "to encourage service providers to self-regulate the dissemination of offensive material over their services" and to remove disincentives to self-regulation); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (holding that § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions); 141 Cong. Rec. H8460-01, H8470 (1995) (statement of Rep. Barton) (Congress enacted § 230 to give interactive service providers "a reasonable way to . . . help them self-regulate themselves without penalty of law").

[47] *See* Verified Compl. at ¶¶ 8, 13, and 23-26 (Ex. D to the Thau Aff.).

[48] *See* Julia Angwin & Brian Steinberg, *News Corp. Goal: Make MySpace Safer for Teens*, Wall St. J., Feb. 17, 2006, at B1 (Ex. F to the Thau Aff.); Jessi Hempel, *From MySpace to Safer Place?*, Business Week, April 11, 2006 (Ex. I to the Thau Aff.).

[49] *See* Verified Compl. at ¶¶ 26-29 (Ex. D to the Thau Aff.).

In *Green v. America Online (AOL)*, the Third Circuit affirmed the dismissal of claims against AOL for its alleged failure to protect the plaintiff from harassment, defamation, and virus-like computer programs in AOL chat rooms.[52] The plaintiff alleged that AOL's user agreement "contain[ed] promises that AOL would protect [him] from other subscribers," although the agreement actually contained a disclaimer of responsibility for third-party content that tracked the language of the CDA.[53] The Third Circuit held that the CDA's "Good Samaritan" provision immunized AOL against liability for its failure to effectively implement its voluntary safety features: "Section 230(c)(2) . . . allows AOL to establish standards of decency without risking liability for doing so."[54]

Like the AOL Member Agreement in the *Green* case, the MySpace Terms of Use Agreement tracks the language of the CDA, stating among other disclaimers that "MySpace assumes no responsibility for monitoring the Services for inappropriate Content or conduct."[55] Furthermore, the MySpace policies that Plaintiffs challenge are voluntary measures taken in good faith for the purpose of protecting MySpace.com users. Imposing liability for the alleged ineffectiveness of safety features creates a disincentive to implement safety measures in the first place. This is precisely the result that the CDA seeks to avoid.

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[50] *Reno v. ACLU*, 521 U.S. 844, 855-57 (1997) (holding that mandatory age verification on adult web sites was an overly restrictive prohibition on protected speech in violation of the First Amendment); *see also American Booksellers Found. v. Dean*, 342 F. 3d 96, 99 (2d Cir. 2003) (noting that Internet age verification technology has not changed substantially since the Supreme Court's decision in *Reno v. ACLU*).

[51] *Id.*

[52] 318 F.3d 465 (3d Cir. 2003).

[53] *Id.* at 471.

[54] *Id.* at 472.

[55] MySpace Terms of Use Agreement, May 1, 2006 at § 7.1 (Ex. A to the Polesetsky Aff.).

B. Plaintiffs' Claims are Barred Under the Common Law

1. *New York Choice of Law Principles Dictate That Texas Law Applies in This Case*

Texas substantive law governs Plaintiffs' claims. As the Plaintiffs themselves stated in their First Amended Response to Defendants' Special Exceptions: "All of Plaintiffs' claims asserted in Plaintiffs' First Amended Original Petition are based on Texas common-law."[56] New York resolves choice of law issues under an interest-analysis test, under which "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders."[57] Texas's interests in this dispute are significant: Plaintiffs were allegedly harmed in Texas by a Texas resident; Defendants allegedly failed to prevent the alleged sexual assault of one Texas resident by another Texas resident; and Plaintiffs claim that they relied on the alleged misrepresentations in Texas.[58]

By contrast, Plaintiffs' claims have little, if any, connection to New York. MySpace's parent corporation (News Corporation) has its principal place of business in New York County (though Plaintiffs chose to file this action in the Bronx), and Plaintiffs make wholly conclusory and non-specific allegations that "decisions" were made in New York that led to the purported failure to act and misrepresentations.[59]

Even assuming, *arguendo*, that certain decisions regarding MySpace and MySpace.com were actually made in New York, there is no support for the application of New York law. "The locus of the tort 'is considered to be the place where the last event necessary to make the actor liable occurred,' which is 'where the plaintiff's injuries occurred.'"[60] Plaintiffs' alleged injuries occurred in Texas. And Plaintiffs have requested damages for Julie Doe's alleged "pecuniary loss, mental anguish, psychological trauma, pain and suffering, and emotional distress, in the past and the future, as well as future medical and psychological counseling expenses"[61]– all of which have been suffered and incurred where Plaintiffs reside: Texas. Moreover, MySpace's alleged misrepresentations were made and relied upon (if at all) in Texas (where Plaintiff Julie Doe accessed and utilized MySpace.com). Accordingly, Texas substantive law will apply to Plaintiffs' claims.

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[56] Plaintiffs' First Amended Response to Defendants' Special Exceptions, filed in *Doe v. Myspace, Inc.*, No. D-1-GN-06-002209, at ¶¶ 1-2 (261st Dist. Ct., Travis County, Tex. Sept. 1, 2006) (attached as Ex. J to the Thau Aff.).

[57] *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 280 (N.Y. 1993).

[58] The same result would obtain under Texas choice of law rules. *See Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 205-06 (Tex. 2000) (explaining relevant choice of law factors under Texas law).

[59] Verified Compl. at ¶¶ 3, 4 (Ex. D to the Thau Aff.).

2. *Under Texas Law, MySpace Has No Duty to Prevent Third Parties from Committing Crimes*

Statutory immunity aside, Plaintiffs' Verified Complaint fails to state a claim for negligence and gross negligence by MySpace under Texas common law. The elements of those causes of action include a legal duty and a breach of that duty.[62] Contrary to Plaintiffs' assertions, MySpace had no legal duty "to institute and enforce" security measures that would substantially decrease the likelihood that Julie Doe would be criminally assaulted.[63] Under Texas law, MySpace had no duty to prevent Pete Solis from committing a criminal act.

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[60] *Altschuler v. Univ. of Pa. Law School*, 1997 WL 129394, at *11 (S.D.N.Y. Mar. 21, 1997) (quoting *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 195, 491 N.Y.S.2d 90, 94, 480 N.E.2d 679 (N.Y. 1985)); *see also Palace Exploration Co. v. Petroleum Dev. Co.*, 41 F. Supp. 2d 427, 435 (S.D.N.Y. 1998) ("reliance in New York on defendant's misrepresentation fixes the situs of the injury in New York."); *J.A.O. Acquisition Corp. v. Stavitsky*, 745 N.Y.S.2d 634, 639 (N.Y. Sup. 2001) ("[U]nder New York conflict of law principles, fraud claims are governed by the law of the place of injury, where plaintiffs are located.") (citing *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 67 F. Supp. 2d 189 (S.D.N.Y. 1999); *Odyssey RE (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 292 (S.D.N.Y. 2000), *aff'd*, 2 Fed. Appx. 109, 2001 WL 46565 (2d Cir. 2001).

[61] Verified Compl. at 20 (Ex. D to the Thau Aff.).

[62] *Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005); *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 231 (Tex. 2004).

[63] *See* Verified Compl. at ¶ 41 (Ex. D to the Thau Aff.).

The Texas Supreme Court has repeatedly stated that a person generally "has no legal duty to protect another from the criminal acts of a third person."[64] Such a duty arises only when a "special relationship" between the defendants imposes a duty upon the third-party defendant to control the actor's conduct. The only relationships recognized by Texas courts as giving rise such a duty are those between (1) "employer and employee," (2) "parent and child," and (3) "independent contractor and contractee under special circumstances."[65]

Plaintiffs have alleged no such relationship between MySpace and Pete Solis, nor could they. Pete Solis is merely one of over 118 million people who have posted an online profile on MySpace.com. The alleged criminal event happened offline, after telephone conversations offline, and there is no allegation that MySpace was in control of the premises where the crime occurred. There is no special relationship giving MySpace control over Pete Solis or Julie Doe, and accordingly, Plaintiffs have not, and cannot, state a negligence or gross negligence claim against MySpace based on Pete Solis's alleged sexual assault. MySpace had no legal duty to prevent the alleged sexual assault.

3. *The Alleged Sexual Assault Was a "New and Independent Cause" of Plaintiffs' Injuries*

According to the Verified Complaint, Pete Solis "lured 14-year-old Julie Doe out and sexually assaulted her."[66] As their Texas complaint reveals, however, Julie Doe exchanged phone numbers with Pete Solis after exchanging friend requests with him on MySpace.com.[67]

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[64] *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996); *accord Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) ("Generally, there is no duty to control the conduct of third persons."); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) ("As a general rule, one person is under no duty to control the conduct of another, Restatement (Second) of Torts § 315 (1965), even if he has the practical ability to exercise such control.").

[65] *See Phillips*, 801 S.W.2d at 525; *cf. Walker*, 924 S.W.2d at 377 ("Similarly, a landowner has no duty to prevent criminal acts of third parties who are not under the landowner's supervision or control.").

[66] Verified Compl. at ¶ 29 (Ex. D to the Thau Aff.).

[67] Am. Tex. Pet. at ¶ 32-33 (Ex. B to the Thau Aff.).

After several telephone conversations, Julie Doe and Pete Solis agreed over the phone to go out on a date. They then met, and went to dinner and a movie. None of this was illegal. At the end of the date, there was an alleged sexual encounter resulting in criminal charges against Pete Solis. The fact that Pete Solis's alleged criminal conduct occurred at the end of the date fatally undermines the proximate cause element of Plaintiffs' tort claims.

Under Texas law, Pete Solis's alleged sexual assault constitutes a "new and independent cause" of Plaintiffs' injuries. "A 'new and independent cause' is defined as an act or omission of a separate and independent agency that destroys the causal connection between the negligent act or omission of the defendant and the injury complained of, and thereby becomes the immediate cause of such injury."[68] Texas courts typically consider the criminal conduct of a third party to be a new and independent cause relieving an alleged negligent actor from liability.[69] Plaintiffs therefore cannot establish the proximate cause element of their tort claims.

C. Plaintiffs Have Failed to Plead Fraud and Negligent Misrepresentation with Particularity

Plaintiffs' fraud and negligent misrepresentation claims must be dismissed for failure to state a claim on which relief may be granted because they do not meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b).[70] To satisfy Rule 9(b), Plaintiffs must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent."[71] The fourth requirement incorporates the substantive law of fraud and negligent misrepresentation, thus obligating Plaintiffs to plead specific facts in support of each element of their claims.[72] Fraud and negligent misrepresentation share the common element of justifiable reliance.[73] The Verified Complaint fails to plead facts in support of Plaintiffs' alleged reliance on MySpace's representations.

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[68] *Rodriguez v. Moerbe*, 963 S.W.2d 808, 820 (Tex. App.—San Antonio 1998, pet. denied).

[69] *Id.*

[70] Because Rule 9(b) does not provide a mechanism for dismissal, a motion to dismiss for failure to plead with particularity is construed as a motion to dismiss for failure to state a claim on which relief may be granted under Rule 12(b)(6). *See, e.g., Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 125 n.4 (2d Cir. 2001) (citing 5A Wright & Miller, *Federal Practice and Procedure*, § 1357 (2d ed. Supp. 2001)).

To satisfy Rule 9(b), Plaintiffs must make specific factual allegations of reliance, not merely general allegations that they relied on MySpace's misrepresentations.[74] Such conclusory allegations do not suffice.[75] Yet Plaintiffs plead no facts whatsoever to explain how they relied on MySpace's alleged misrepresentations. It is not enough to allege that fraudulent or negligent misrepresentations were made. Plaintiffs' claims must rest on *their own reliance* on MySpace's statements, *i.e.*, that Julie Doe (1) heard or read the alleged representations and (2) that she relied on these statements in (a) deciding to join MySpace.com or (b) taking some other step that led directly to the alleged sexual assault.[76] Plaintiffs do not state that they *knew of any particular*

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[71] *Reserve Solutions, Inc. v. Vernaglia*, 438 F. Supp. 2d 280, 287 (S.D.N.Y. 2006) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)).

[72] *Id.* (citing *Kaye v. Grossman*, 202 F.3d 611, 614 (2d Cir. 2000)).

[73] *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997) ("At the outset, we recognize that the fraud, fraudulent concealment, negligent misrepresentation, and express warranty claims all share the common element of reliance."); *Harrison v. Bass Enters. Prods. Co.*, 888 S.W.2d 532, 536 (Tex. App.—Corpus Christi 1994, no writ).

[74] *See, e.g.*, *Bank of Am. Corp. v. Lemgruber*, 385 F. Supp. 2d 200, 230 (S.D.N.Y. 2005) ("As an essential element of a cause of action for fraud . . . reliance must be pleaded with particularity pursuant to [Rule] 9(b).") (internal quotation marks omitted).

[75] *See, e.g.*, *Reserve Solutions, Inc. v. Vernaglia*, 438 F. Supp. 2d 280, (S.D.N.Y. 2006); *Solow v. Stone*, 994 F. Supp. 173, 182 (S.D.N.Y. 1998) (assertion that defendants "fraudulently concealed their actions" did not satisfy Rule 9(b)); *see also Pilarczyk v. Morrison Knudsen Corp.*, 965 F. Supp. 311 (N.D.N.Y. 1997) (conclusory allegations that statement in annual report were misleading was insufficient because the complaint failed to specify the exact statements alleged to be fraudulent and to explain why they were fraudulent); *cf. Nat'l Group for Communications & Computers Ltd. v. Lucent Techs., Inc.*, 420 F. Supp. 2d 253, 264 (S.D.N.Y. 2006) ("A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6).") (quoting *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996)) (alteration in original).

[76] *See In re Enron Corp. Secs., Derivative & "ERISA" Litig.*, 388 F. Supp. 2d 780, 785 (S.D. Tex. 2005) ("To demonstrate reliance, a plaintiff suing for fraud must allege and prove that he knew of and was induced by defendant's representations, although those representations need not be the sole reason he entered into the transaction.") (citing *Marburger v. Seminole Pipeline Co.*, 957 S.W.2d 82, 86 n. 5 (Tex. App.—Houston [14th Dist.]

statement by MySpace, much less explain how they relied on it.[77] What is more, each of the articles cited in the Plaintiffs' Verified Complaint were published well after Julie Doe created her false profile on MySpace.com in August 2005. Because Plaintiffs fail completely to plead an essential element of their fraud and negligent misrepresentation claims, Rule 9(b) requires dismissal.[78]

D. Even if Plaintiffs Had Pleaded Fraud and Negligent Misrepresentation with Particularity, The Terms of Use and Tips for Parents Demonstrate That These Claims Are Groundless

Plaintiffs' Verified Complaint is founded on the assertion that MySpace misrepresented the safety of MySpace.com. In fact—as Plaintiffs' own Complaint reveals—MySpace made no misrepresentations whatsoever about the safety of MySpace.com or the accuracy of information posted by MySpace.com members. On the contrary, MySpace.com's Terms of Use Agreement, which Plaintiffs incorporate in the Verified Complaint, specifically cautioned potential members that MySpace could not verify information posted by MySpace.com members. MySpace.com's Tips for Parents, also incorporated in the Verified Complaint, stated clearly that safety mechanisms designed to protect young members would not work if members misrepresented their age. The public comments on which Plaintiffs rely are consistent with the Terms of Use and Tips for Parents. In the light of MySpace's detailed warnings, Plaintiffs would not have been justified in relying on statements to the contrary even if they had been made. Their claims must therefore be dismissed.

1997, no writ)); *Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 930 (Tex. 1996) (overturning the jury's verdict of fraud because the plaintiff failed to show that she relied on the defendant's statements that it would call her back to work when a job became available, e.g., by turning down other job opportunities).

[77] Plaintiffs merely state that "Plaintiffs relied upon them, and Plaintiffs' reliance was justifiable." Verified Compl. at ¶ 57 (Ex. D to the Thau Aff.). Indeed, the facts in the Complaint belie the allegation that Julie Doe relied on MySpace's statement that users must be fourteen years old. As Plaintiffs point out, Julie Doe created a profile on MySpace.com when she was thirteen. *See id.* at ¶ 27.

[78] *Evercrete Corp. v. H-Cap Ltd.*, 429 F. Supp. 2d 612, 628 (S.D.N.Y. 2006) (dismissing the plaintiff's fraud claim because it "d[id] not allege that *they themselves* ever relied on any misrepresentation.") (emphasis added).

1. *The Pleadings Show Clearly That MySpace Made No Misrepresentations*

The Verified Complaint does not point to a single false statement of fact by MySpace. Plaintiffs allege generally that MySpace made "numerous material and false express and implied representations to the public that MySpace was safe for young underage MySpace users."[79] Plaintiffs point to four specific statements: (1) MySpace's statement that MySpace.com users must be 14 years old and that the web site incorporates "special protections to users who are under 16 so that their personal information cannot be accessed by persons they don't know;"[80] (2) News Corporation CEO Rupert Murdoch's statement that "no one under 14 is allowed on the site, and there are strict limits on who can access profiles of users under 16;"[81] (3) MySpace.com's Terms of Use Agreement, which states that solicitation of personal information from persons under 18 is "illegal" or "prohibited;" and (4) MySpace.com's "Tips for Parents," which states that "MySpace members must be 14 years of age or older."[82] None of these statements is false; therefore, none of them supports Plaintiffs' claims.

Plaintiffs' generalized allegations are belied by the clear terms of the MySpace.com Terms of Use Agreement and the MySpace.com Tips for Parents. Because these documents are incorporated in the Verified Complaint, they are properly considered in deciding MySpace's Motion to Dismiss.[83] When an exhibit attached to a plaintiff's complaint conflicts with the factual allegations in the complaint itself, the exhibit controls.[84] Accordingly, Plaintiffs' non-specific allegation that MySpace made express and implied misrepresentations is of no effect (apart from its failure to satisfy Rule 9(b)) because it is contradicted by the very statements on which Plaintiffs rely.

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[79] Verified Compl. at ¶ 54 (Ex. D to the Thau Aff.).

[80] *Id.* at ¶ 23.

[81] *Id.*

[82] *See id.* ¶ 24.

[83] *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996) ("In considering a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference.") (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir.1991)).

Each and every statement upon which Plaintiffs allegedly relied is a true and accurate statement of fact. The statements by MySpace representatives and Mr. Murdoch that MySpace.com members must be 14 years old and that MySpace.com incorporates special protections for users under 16 accurately reflect the policies of MySpace and MySpace.com. Likewise, MySpace.com's Tips for Parents accurately states MySpace's policy that MySpace.com members must be 14 years old. Finally, solicitation of users under 18 is prohibited by MySpace, as stated in the Terms of Use Agreement. There is simply nothing false or inaccurate about these statements.

Plaintiffs improperly attempt to portray these statements as a guarantee that it is impossible for persons under 14 to join MySpace.com or for MySpace.com members under the age of 16 to communicate with adult users. Plaintiffs' mischaracterization does not stand up to scrutiny based on the documents themselves. Far from making any guarantees about the age or identity of MySpace users, the Terms of Use Agreement makes clear that MySpace does not warrant the accuracy of user content and that user profiles may contain false or offensive content:

> Please choose carefully the information you post on MySpace.com and that you provide to other Users. Your MySpace.com profile may not include the following items: telephone numbers, street addresses, last names, and any photographs containing nudity, or obscene, lewd, excessively violent, harassing, sexually

[84] *See Sazerac Co. v. Falk*, 861 F. Supp. 253, 257 (S.D.N.Y. 1994) ("[I]f the allegations of a complaint are contradicted by documents made a part thereof, the document controls and the court need not accept as true the allegations of the complaint.") (citing *Feick v. Fleener*, 653 F.2d 69, 75 n.4 (2d Cir. 1981)), *quoted in ESI, Inc. v. Coastal Corp.*, 61 F. Supp. 2d 35, 73 (S.D.N.Y. 1999).

> explicit or otherwise objectionable subject matter. *Despite this prohibition, information provided by other MySpace.com Members (for instance, in their Profile) may contain inaccurate, inappropriate, offensive or sexually explicit material, products or services, and MySpace.com assumes no responsibility or liability for this material.* If you become aware of misuse of the Services by any person, please contact MySpace or click on the "Report Inappropriate Content" link at the bottom of any MySpace.com page.[85]
>
> . . .
>
> MySpace.com may delete any Content that in the sole judgment of MySpace.com violates this Agreement or which may be offensive, illegal or violate the rights, harm, or threaten the safety of any person. *MySpace.com assumes no responsibility for monitoring the Services for inappropriate Content or conduct.* If at any time MySpace.com chooses, in its sole discretion, to monitor the Services, MySpace.com nonetheless assumes no responsibility for the Content, no obligation to modify or remove any inappropriate Content, and *no responsibility for the conduct of the User submitting any such Content.*
>
> . . .
>
> You are solely responsible for the Content that you post on or through any of the Services, and any material or information that you transmit to other Members and for your interactions with other Users. MySpace.com does not endorse and has no control over the Content. *Content is not necessarily reviewed by MySpace.com prior to posting and does not necessarily reflect the opinions or policies of MySpace.com. MySpace.com makes no warranties, express or implied, as to the Content or to the accuracy and reliability of the Content or any material or information that you transmit to other Members.*[86]

Plaintiffs' claims of fraud and negligent misrepresentation are further undermined by the plain language of MySpace's "Tips for Parents." The warnings on the Tips for Parents page also definitively show that Plaintiffs cannot claim to have justifiably relied on any purported representation that MySpace verifies the age or identity of its users:

> As a parent, please consider the following guidelines to help your children make safe decisions about using online communities.
>
> . . .

[85] *See* MySpace Terms of Use Agreement, May 1, 2006, cited and incorporated by reference in Plaintiffs' Verified Compl. at ¶ 24 (emphasis added) (Ex. A to the Polesetsky Aff.).

[86] *Id.* at §§ 7.1 & 7.2 (emphasis added).

> Kids shouldn't lie about how old they are. MySpace members must be 14 years of age or older. *We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such.* MySpace will delete users whom we find to be younger than 14, or those misrepresenting their age.
>
> . . .
>
> *People aren't always who they say they are.* Ask your children to be careful about adding strangers to their friends list. It's fun to connect with new MySpace friends from all over the world, but members should be cautious when communicating with people they don't know. They should talk to you if they want to meet an online friend in person, and if you think it's safe, any meeting should take place in public and with friends or a trusted adult present.[87]

The Verified Complaint, and the documents incorporated therein, thus prove that MySpace made no representation to Plaintiffs or any MySpace.com members that MySpace verified the accuracy of information in MySpace.com member profiles, nor did it represent that MySpace.com posed no danger to young members. On the contrary, MySpace expressly cautioned that it could not guarantee the accuracy of information posted by MySpace.com members and advised members about specific risks inherent in the MySpace.com community.

Because the facts contained in the exhibits to Plaintiffs' Complaint contradict Plaintiffs' own allegations, the exhibits trump and the allegations are of no effect. Plaintiffs are thus left with the representations made by MySpace in the MySpace.com Terms of Use Agreement, MySpace.com's Tips for Parents, and the public statements regarding MySpace. All of these representations are true. None of them purport to guarantee the safety—online or off—of MySpace.com users. None of them purport to guarantee the accuracy of information posted on MySpace.com by third parties. Plaintiffs effectively plead no facts in support of their allegation that MySpace made false statements of fact about the rules and policies of MySpace.com. Even if they became aware of such a misrepresentation, they were not justified in relying on it because it conflicted with MySpace's own statements on MySpace.com. Plaintiffs' can therefore prove no set of facts that will entitle them to relief on their fraud and misrepresentation claims.

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[87] *See* MySpace Tips for Parents, cited and incorporated by reference in Verified Compl. at ¶ 24 (emphasis added) (Ex. B to the Polesetsky Aff.).

2. *Even if MySpace Had Somehow Represented That MySpace.com Posed No Danger to Young Members, Any Reliance on Such Representation Was Unjustifiable As a Matter of Law.*

Even if MySpace had somehow misrepresented that it verified MySpace.com members' profiles or that MySpace.com posed no risk to young members, the Verified Complaint fatally undermines any claim that Plaintiffs relied justifiably on such statements. Under Texas law, the Plaintiffs cannot assert fraud or misrepresentation claims based on alleged representations that are directly contradicted by the terms of a written agreement.[88] The very documents that Plaintiffs cite as evidence of the alleged misrepresentations make clear that MySpace does not guarantee the contents posted on MySpace.com, but rather states that "[p]eople aren't always who they say they are," and that MySpace is not able to protect its 14 and 15 year-old members if—like Julie Doe—they lie about their age. Julie Doe necessarily agreed to the provisions of the Terms of Use Agreement as consideration for the privilege to use MySpace.com, and she is bound by its terms. Because Julie Doe had actual knowledge that MySpace could not verify data posted by MySpace.com members, and because the Terms of Use flatly contradict Plaintiffs' allegations, they can prove no set of facts to establish that they relied justifiably on MySpace's alleged misrepresentations.

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[88] *C & A Invs., Inc. v. Bonnet Res. Corp.*, 959 S.W.2d 258, 263-64 (Tex. App.—Dallas 1997, writ denied); *Fisher Controls Int'l, Inc. v. Gibbons*, 911 S.W.2d 135, 142 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Bluebonnet Sav. Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 907-10 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Airborne Freight Corp. v. C.R. Lee Enters., Inc.*, 847 S.W.2d 289, 295 & 297-98 (Tex. App.—El Paso 1992, writ denied); *see also Rice v. Omnitrition Int'l, Inc.*, No. 05-98-01634-CV, 2001 WL 717853, at *4 (Tex. App.—Dallas June 27, 2001, no pet.) ("A party cannot rely on oral representations to override the specific language of a written contract and extend the length of the contract."). The same appears to be true under New York law. *See Mfrs. Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 315 (2d Cir. 1993) ("When, however, the contract states that a contracting party disclaims the existence of or reliance upon specified representations, that party will not be allowed to claim that he was defrauded into entering the contract in reliance on those representations."); *Greenberg v. Chrust*, 282 F. Supp. 2d 112, 120 (S.D.N.Y. 2003) ("Under New York law, reasonable reliance is precluded when 'an express provision in a written contract contradicts a prior alleged oral representation in a meaningful fashion.'") (quoting *Republic Nat'l Bank v. Hales*, 75 F. Supp. 2d 300, 315 (S.D.N.Y. 1999), and citing *Bango v. Naughton*, 184 A.D.2d 961, 963 (N.Y. App. 1992) ("[C]onflict between the provisions of the written contract and oral representations negates the claim of reliance upon the latter.")).

According to Plaintiffs, MySpace publicly represents that MySpace.com is safe for young members and off-limits to persons under 14, when in fact it lacks "meaningful security measures"[89] or any effective age restrictions. Assuming that the Plaintiffs' characterizations are accurate (which MySpace denies), Plaintiffs could not reasonably rely on these alleged statements. As an initial matter, Julie Doe had actual knowledge that the ages listed by MySpace.com members were not necessarily accurate because she had misrepresented her own age to join MySpace.com when she was only 13 years old. Her personal knowledge aside, the MySpace Terms of Use Agreement, on which Plaintiffs' misrepresentation claims are based,[90] expressly states that MySpace does not review the content of its members' profiles and disclaims any warranty as to the safety or accuracy of content posted by members.[91] Because the alleged misrepresentations underlying their claims are contradicted by the Terms of Use Agreement, Plaintiffs can prove no set of facts to establish reasonable reliance on MySpace's alleged representation that it verifies the age and identity of its users.

III.
CONCLUSION

For the foregoing reasons, MySpace respectfully moves this Court pursuant to Federal Rule of Civil Procedure 12(b)(6) and 9(b) to dismiss all claims asserted against MySpace.

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[89] Verified Compl. at ¶ 17 (Ex. D to the Thau Aff.).

[90] *See id.* at ¶ 24.

[91] *See* MySpace Terms of Use Agreement, May 1, 2006 at §§ 7.1 & 7.2 (Ex. A to the Polesetsky Aff.).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of October, 2006, the Memorandum of Law in Support of Motion to Dismiss was served by hand delivery, upon:

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